87-77

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

DR. ROBERT HEATH,
Petitioner,

v.

DOUGLAS CAST, ROBERT HARDY, J. BROWN, and PETE PERRIN,
Respondents.

WILLIE MCKINLEY,
Petitioner,

v.

CITY OF RIVERSIDE, RICHARD CANALE, THOMAS BUCKINGHAM, KEITH MCCAULEY, RALPH MOORHOUSE, and WILLIAM EDENHOFER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In a civil rights action brought pursuant to 42 U.S.C. 1983 (1982), in which the affirmative defense of qualified immunity has been asserted, and in which the federal constitutional rights alleged to have been violated were clearly established at the time of the alleged violation, may the trial court instruct the jury on the affirmative defense of qualified immunity?[1]

2. May an appellate court treat as harmless error the clear violation of F. R. Civ. P. (West 1986) Rule 47(b), by selection of

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1. This issue is identical to both petitioners, and is the basis for this joint petition for certiorari. Sup. Ct. Rule 19.4. Issues 2-4 concern only petitioner Heath.

In light of this Court's June 25, 1987 decision in Anderson v. Creighton, 85-1520, it is clear that the answer to the question posed in issue No. 1 must be "no."

an alternate juror by lot to replace an excused regular juror, when such trial court clear error affects a substantial right to trial by jury, and/or when the harmless error rule, F. R. Civ. P. Rule 61, applies only to trial courts?[2]

3. Is the grant of a state court suppression motion based on a state court finding of unconstitutional conduct issue preclusive in a subsequent action brought under 42 U.S.C. 1983?

4. Is the admission in evidence in an action under 42 U.S.C. 1983 of prior arrests of the plaintiff by other members of the same police force permissible to show bias against different police officer defendants in the Section 1983 action?

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2. Issues 2-4 involve only Dr. Heath's petition.

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CITY OF RIVERSIDE, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Dr. Robert Heath and Willie McKinley petition this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinions of the Court of Appeals (App. A., and App. B. infra) are an opinion published at 814 F. 2d 254 (9th Cir.1987)(Heath), and a memorandum not for publication (McKinley), respectively.

JURISDICTION

The judgments of the Court of Appeals were entered on March 24, 1987 and June 4, 1987, respectively. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) and Rule 19.4 of this Court.

STATEMENT

1. Heath.

In the complaint, CR-1, it is alleged that defendant Newport Beach, California police officers illegally seized plaintiff by using excessive force and arresting plaintiff, in violation of Amendment IV to the United States Constitution.

A. Good Faith Jury Instruction. In Heath, the affirmative defense of good faith/qualified immunity was pled in the answer, but no "extraordinary circumstances," Harlow v. Fitzgerald, 457 U.S. 800 (1982), were pled. Heath timely objected to a jury instruction on good faith/qualified immunity, CR-35, p. 2, ll. 2-5, the issue was briefed, CR-56, and the court decided that no good faith instruction would be given to the jury. This was done in chambers and not on the record. Notwithstanding this ruling, the court gave a good faith instruction, RT-10-721, Heath again objected, RT-10-87, the court indicated it would "review it and see if I think a change needs to be made...[and] if so, I will give it at the end of argument." Ibid. The court made no change at the end of argument. The Ninth Circuit held on this point that "[t]he qualified immunity defense is available in cases of unlawful arrest [,]' Hamblen v. County of

Los Angeles, 803 F. 2d 462, 265 (9th Cir. 1986) (citations omitted) [a]nd in any event only one jury instruction included the words 'good faith', and that instruction concerned the issue of punitive damages not qualified immunity." 814 F. 2d at 261. The subject instruction is set out at footnote 6 to the Ninth Circuit opinion. The instruction is not a punitive damages instruction, but is the defendants' contention instruction in which defendants clearly set forth their good faith defense.

B. Selection of Alternate Juror by Lot. Ms. Basilio was called first as an alternate juror. Ms. Schimidtt was called second as an alternate juror. Ms. Basilio was excused. Ms. Bolles was called third as an alternate juror. RT-1-45-50. A regular juror was excused after the trial began, and the trial court, over plaintiff's strong objection, insisted on selecting by lot an alternate to replace the regular juror. Ms. Bolles, the third

alternate called, was chosen by lot to join the jury. RT-7-26-29. The Ninth Circuit ruled that (1) plaintiff treated the third alternate called, Bolles, as the de facto first alternate, and (2) the erroneous procedure was harmless error. The first ruling by the Ninth Circuit is not supported even by its own citation to the record: plaintiff's counsel clearly and unambiguously told the trial court that "I think the Federal Rules of Civil Procedure say they have to be taken in the order in which they were chosen." 814 F. 2d at 256. The trial court arrogantly responded: "All right. We are going to do it my way [by lot]." Ibid. The second Ninth Circuit ruling, on harmless error, is not supported or supportable.

C. Issue Preclusion. In ruling that the trial court correctly denied plaintiff's motion for summary adjudication of the issue of a constitutional violation, based on the grant by

a state court of plaintiff's suppression motion, the Ninth Circuit misapplied California law on issue preclusion by finding that, in California, an issue decided in a prior criminal proceeding is not issue preclusive in a subsequent civil action. California issue preclusion law, as relied on by the Ninth Circuit, denies issue preclusion on suppression motions only in subsequent criminal actions, but not in subsequent civil actions.

D. Prior Bad Acts. The trial court admitted evidence of prior arrests of plaintiff by other Newport Beach police officers, and the Ninth Circuit upheld this ruling on the theory that the evidence was "probative of... bias against the Newport Beach police and of Heath's motive in bringing this action." 814 F. 2d at 259.

2. McKinley.

In the complaint, CR-1, it is alleged that defendant Riverside, California police officers

illegally seized plaintiff, a black American, by using excessive force and arresting plaintiff at an after-hours Riverside, California bar attended only by black persons, while rousting persons at the bar, in violation of Amendments IV and XIV to the United States Constitution.

The affirmative defense of qualified immunity was pled in the answer, but no extraordinary circumstances were pled. App. at p. B-3. Over objection, the trial court instructed on the defense. The Ninth Circuit held that "the defense is available...even though applicable constitutional standards were 'sufficiently well-established.' Bilbrey by Bilbrey v. Brown, 738 F. 2d 1462 at 1466-1467 99th Cir. 1984)...[and b]oth subjective and objective elements are injected into the elements of the qualified immunity defense." Id. at p. B-3.

REASONS FOR GRANTING THE PETITION

1. There has been a faulty construction of decisions of this Court which will affect virtually every action brought under 42 U.S.C. 1983 and pursuant to this Court's opinion in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

2. Public officials have used methods which are alien to our American system of justice.

3. The opinions below are at odds with

A. decisions in the same Circuit, and

B. decisions in other circuits.

Petitioners arecognizant of the fact that the Supreme Court does not sit as a court of errors, but rather sits to resolve important issues of federal law.

The fundamental civil rights laws which govern the conduct of all law enforcement officers throughout this Country and which

provide for remedies for those who allege and prove that their federal civil rights were violated, have been interpreted in such a way so as to pervert their meaning, invite illegal and unethical conduct, and impugn the integrity of the federal courts.

Specifically, 42 U.S.C. 1983 has been interpreted to provide a defense to allegations of wrongdoing by police officers with which this Court has done away, and with respect to which other decisions both in the same Circuit and in other Circuits are at odds.

I. QUALIFIED IMMUNITY.

1. THIS COURT DID AWAY WITH THE SUBJECTIVE COMPONENT OF THE DEFENSE OF QUALIFIED IMMUNITY.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court did away with the subjective component of the affirmative defense of qualified immunity. In Mitchell v. Forsythe, 105 S. Ct. 2806, 2816 (1985), this Court held:

> All [a court] need determine [on a motion to adjudicate the issue of qualified immunity] is a question of law: · whether the legal norms allegedly violate by the defendant were clearly established at the time of the challenged actions...

The effect of both Harlow and Mitchell was to reduce the question of the applicability of the affirmative defense of qualified immunity to a purely legal question. In so doing, this Court, sub silentio, modified its holding in Procunier v. Navarette, 434 U.S. 555, 562 (1978), to the extent Procunier provided that part of the test on determining the applicability of the qualified immunity defense was "if [defendants] knew or should have known of [the] right [violated], and if [defendants] should have known that their conduct violated the constitutional norm." The "knew or should have known" part of the Procunier test was part

of the subjective component of the defense, and was done away with in Harlow.

The issue of qualified immunity is one purely of law: if the law was clear, the defense is inapplicable; if the law was not clear, not only is the defense applicable, but the action is over for the plaintiff, for the defense operates as a bar to suit.

The Seventh Circuit followed this Court's holding on this point in Bates v. Jean, 745 F. 2d 1146, 1151 (7th Cir. 1984) ("[T]he question of qualified immunity is addressed to the court not the jury. See Mitchell v. Forsythe, ___ U.S. ___, 105 C. Ct. 2806 (1985); Harlow, 457 U.S [800] at 818-19....") (Emphasis supplied), and in Benson v. Allphin, 786 F. 2d 268, 274 (7th Cir. 1986) ("[A]n inquiry into [officer] Allphin's actual state of mind is not appropriate under Harlow; the only question is whether his actions were objectively reasonable [and that is an issue for the trial court to decide].")

Also, the Ninth Circuit completely disregards the "clearly established legal norms" test, Mitchell supra, which operates when the law is found to be clearly established, to preclude the defense absent Harlow's "extraordinary circumstances" condition subsequent having been pleaded and proved. In Lutz v. Weld, 784 F. 2d 340 (10th Cir. 1986), the Tenth Circuit correctly followed the law and held that when relevant law is clearly established

> [d]efendants [are] entitled to an instruction on their qualified immunity defense only by raising a fact issue as to whether there were exceptional circumstances such that a reasonable person..would not have known the relevant legal standard [Citation to Harlow omitted.]

No such "extraordinary circumstances" were alleged by the defendants in this case, and

there was therefore no fact issue concerning the defense to be submitted to the jury. See Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 3018, 82 L. Ed. 2d 139 (1984) ("no other 'circumstances' are relevant to the issue of qualified immunity").

Both the trial court and the Court of Appeals failed to follow this Court's holdings in both Harlow and Mitchell. See also, Davis vs. Scherer, 104 S. Ct. 3012, 3018 (1984).

Therefore, on this ground, certiorari should be granted.

2. THE CONSTRUCTION GIVEN BY THE COURTS BELOW TO THE DEFENSE WILL OPERATE TO PERMIT PUBLIC OFFICIALS TO ESCAPE LIABILITY FOR WRONGFUL CONDUCT BASED ON A THEORY OF DEFENSE WHICH NO LONGER EXISTS.

In the complaints it is alleged that defendant police used methods alien to our Constitution. To permit these officials to

escape potential liability based on a defense which this Court has ruled no longer exists, in the form in which it existed prior to this Court's decisions in Harlow, Mitchell and Scherer, is a result which will have a significant deleterious effect on constitutional litigation at least throughout the vast environs of the Ninth Circuit so that this Court should grant certiorari.

3. THE OPINIONS BELOW ARE AT ODDS BOTH WITH DECISIONS IN THE NINTH CIRCUIT AND OTHER CIRCUITS.

A. The opinions below are at odds with other Ninth Circuit decisions. See, Lowe v. City of Monrovia, 775 F. 2d 998, 1011 (9th Cir. 1985); Flores v. Pierce, 617 F. 2d 1386, 1391-92 (9th Cir.), cert. denied, 449 U.S. 875 (1980); Haygood v. Younger, 717 F. 2d 1472, 1483 (9th Cir. 1983), withdrawn, 729 F. 2d 613 (9th Cir. 1984), reversed on other grounds, 769

F. 2d 1350 (9th Cir. 1985); but see, Bilbrey v. Brown, 738 F. 2d 1462 (9th Cir. 1984).

B. The opinions below are at odds with the decisions in all other Circuits who have ruled on this issue. See, B.C.R. v. Fontaine, 727 F. 2d 7, 10 (1st Cir. 1984); Trejo v. Perez, 693 F. 2d 482, 485 (5th Cir.1982); Stokes v. Delcambre, 710 F. 2d 1120, 1125 (5th Cir. 1983); Donta v. Hooper, 774 F. 2d 716, 719 (6th Cir. 1985) pet. for cert. filed March 15, 1986; Windsor v. Tennessean, 719 F. 2d 155, 165 (6th Cir. 1983); cert. denied, 105 S. Ct. 105 (1984); Bates v. Jean, 745 F. 2d 1146, 1151 (7th Cir. 1984); Benson v. Allphin, 786 F. 2d 268, 274 (7th Cir. 1986); Patzner v. Burkett, 779 F. 2d 1363, 1371 (8th Cir. 1985); Goodwin v. Circuit Court, 729 F. 2d 541 (8th Cir. 1984); Lutz v. Weld, 784 F. 2d 340 (10th Cir. 1986). Cf. Skevofilax v. Quigley, 585 F. Supp. 582 (D.N.J. 1984) (an excellent discussion of what a trial court must

do in order to implement this Court's instructions on application of the Harlow qualified immunity test).

What the trial court did, and what the appeals court affirmed, constitutes an application of the qualified immunity defense in civil rights actions which was eschewed by this Court in 1982. In effect, the court below has held that there still is a subjective component of the defense. Since competent public officials are presumed to know clearly established law and what conduct is prescribed by clearly established law, Harlow, supra, once a trial court has determined, as it must under Harlow, that the applicable law was clearly established at the relevant time, it is impermissible for that Court then to instruct the jury on the defense of qualified immunity and ask it to determine whether the officer, as the Court of Appeals below held, "should have known of that right['s existence] and ... if

they knew or should have known that their conduct violated the constitutional norm." That is a formulation of the subjective component of the defense this Court did away with in Harlow.

It is important that this Court make perfectly clear its holding in Harlow so that its prescription will be applied with uniformity throughout the various Circuits in the federal system and within the environs of the vast Ninth Circuit.

II. SELECTION OF ALTERNATE JUROR

1. RULE 47(B), F. R. CIV. P., CLEARLY WAS VIOLATED, AND ITS VIOLATION IS NOT HARMLESS ERROR.

Rule 47 (b), F. R. Civ. P. (West 1986), clearly requires that "[a]lternate jurors in the order in which they are called shall replace jurors who...become or are found to be...disqualified..." The Heath court found a clear violation of this Rule. The violation

was in arrogant defiance of the Rule - "We are going to do it my way [notwithstanding that the court was advised of the correct way]." RT-7-26-29.

Contrary to the Ninth Circuit's unsupported finding, plaintiff's counsel never treated the alternate called third as the de facto first alternate. Clearly, plaintiff's counsel advised the trial court that "they [alternates] have to be taken in the order in which they were chosen." Ibid. (The Ninth Circuit's suggestion that the seat in which an alternate sits is dispositive on who was called first is absurd, as is its implied suggestion that plaintiff's counsel should have initiated a game of musical chairs by the trial court.)

The right to a trial by jury, especially in a civil rights action, is a hallmark of our American system of justice. The abrogation of any facet of that right by an arrogant trial judge whose son is a police officer for the

City of Southgate, a suburb of Los Angeles, and who leaned backwards to help the police defendants in this case by doing it "my way," cannot be countenanced as harmless error; for the harm to the brain-damaged Dr. Heath, who previously was a successful dentist with a Wechsler intelligence quotient of 140, and who now has an I.Q. of 90, is not harmless, but catastrophic.

To hold this error harmless is to countenance and to invite violation of the provisions of Rule 47(b). How can compliance with its provisions be had, when is violation is ruled harmless error? Are judges to abrogate its provisions on whim?

Litigants have a constitutional right to have trials completed by a particular jury. U.S.A. v. Jorn, 400 U.S. 470, 484 (1971). The Ninth Circuit, in this case, ignored its en banc holding in U.S.A. v. Lamb, 529 F. 2d 1153, 1155 (9th Cir. 1975) (en banc), that

"[r]eversal is required because of the failure of the District Court to comply with the plain requirements of Fed. R. Crim. P. 24(c)." The words of Rule 24(c) are the same as the words of Rule 47(b). "The [language of Rule 24(c)] is unambiguous [and]...[t]he Rule is phrased in mandatory terms...." Id. at 1156. So too is the language of Rule 47(b) unambiguous, and so too is its phrasing mandatory. In Keykendall v. Southern Ry. Co., 652 F. 2d 391 (4th Cir. 1981), the court held that the mandatory language of Rule 47(b) must be followed.

Just one week ago, in Gray v. Mississippi, 85-5454 (U.S. Sup. Ct. May 18, 1987), this Court held:

> [T]he impartiality of the ajudicator goes to the very integrity of the legal system....
>
> We have recognized that some constitutional rights [are] so basic to a fair trial that their infraction

can never be treated as harmless error. [Citation omitted.] The right to an impartial adjudicator, be it judge or jury, is such a right.

...

[This] case brings into focus one of the real-world factors that render inappropriate the application of the harmless-error analysis to [jury selection].

...

[T]he relevant inquiry [on the issue of jury selection, so far as application of the harmless error rule is concerned] is "whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error"....[Citations omitted.]

Due to the nature of trial counsel's on-the-spot decisionmaking during

> jury selection, the number of peremptory challenges remaining for counsel's use clearly affects his exercise of those challenges... The nature of the jury selection process defies any attempt to establish that an erroneous...exclusion of a juror is harmless.

Here, too, real-world factors render inappropriate application of the harmless error rule. The relevant inquiry should be whether the jury selection process and/or the composition of the panel, after the alternate replaced the regular juror, "could possibly have been affected by the trial court's error." Application of the provisions of Rule 47(b) should be both uniform and predictable, and not ad hoc as the Ninth Circuit has ruled in this case. Clearly, the trial court had some reason to tamper intentionally, and in the face of the unambigious and mandatory language of Rule

47(b), with the alternate process, and only non-application of the harmless error rule can prevent such abuse.

Contrary to the Ninth Circuit holding, citing the precatory words and dictum of McDonough v. Greenwood, 464 U.S. 548, 553-54 (1984), to be legally binding precedent, no case stands for the proposition that Rule 61, F. R. Civ. P. (West 1986), the harmless error rule, applies to appellate courts: by its plain language, Rule 61 applies only to trial courts on motions for new trials, or to vacate, disturb or set aside a verdict. The scope of Rule 61 does not permit of expansion absent legislation. Because, under Rule 61, errors which "affect the substantial rights of the parties" bar application of the harmless error rule, in no event should it be applied here because the jury selection process embodies a substantial right.

III. ISSUE PRECLUSION

The holding of the Ninth Circuit that, under California law, the finding of a constitutional violation in a prior state court suppression hearing may not be issue preclusive in a subsequent civil rights action is contrary to California law, and to the notions of justice and judicial economy.

California law as set forth in People v. Gephart, 93 Cal. App. 3d 999-1000 (9170), and on which the Ninth Circuit bases its holding on this issue, provides only that a ruling in a prior criminal action on a suppression motion is not issue preclusive in a subsequent criminal action. Gephart sets forth the rationale for this limited rule to be the public policy of not hobbling prosecutors in subsequent criminal actions. That rationale, or public policy, is inapplicable here. Indeed, California law on this point is contrary to the Ninth Circuit holding. In

Miller v. Superior Court, 168 Cal. App. 3d 376 (1985), it was held that a criminal action suppression hearing's results were issue preclusive in a subsequent civil action.

This Court should set forth a uniform rule on this important issue that comes up in more than half of the civil rights cases in the federal courts. See Wilson v. Garcia, 105 S. Ct. 1938 (1985).

IV. PRIOR BAD ACTS

There is no basis in fact or in law to permit the introduction in evidence of prior arrests by the same police department. It cannot be gainsaid that such evidence serves only to smear plaintiff, and arrest by an officer in a police department does not go to the issue of prejudice against another officer. It is clear that a jury knows of the inherent prejudice just by virtue of the suit before it. Rules 401-404, 607-08, and 609(a) make inadmissible such evidence. Its prejudicial

effect is overwhelming and insurmountable in a civil rights action, and this Court should establish a per se rule that such evidence is inadmissible. See Cohn v. Papke, 655 F. 2d 191, 193-94 (9th Cir. 1981) (only purpose of such evidence is to besmirch character, and its is inadmissible); Hirst v. Gertzen, 676 F. 3d 1252, 1262 (9th Cir. 1982) (same); U.S.A. v. Ortega, 561 F. 2d 803, 805-06 (9th Cir. 1977) (same).

CONCLUSION

This petition should be granted.

STEPHEN YAGMAN and MARION R. YAGMAN,
YAGMAN & YAGMAN, P.C.

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DR. ROBERT HEATH, Plaintiff-Appellant, vs. DOUGLAS CAST; ROBERT HARDY; J. BROWN; OFFICER NO. 482 PERRIN, Defendants-Appellees.	)	No. 85-6571 CV-84-1397-WDK OPINION FILED MARCH 24, 1987

Appeal from the United States District Court for the Central District of California.

BEFORE: ALARCON, REINHARDT and THOMPSON, Circuit Judges

DAVID R. THOMPSON, Circuit Judge:

Appellant Robert Heath brought this civil rights action under 42 U.S.C. § 1983. He claimed that Newport Beach police officers arrested him without probable cause and used excessive force to effect his arrest. Following a jury trial in the district court,

judgment was entered in favor of the police officers. On appeal, Heath contends the trial court erred (1) in seating an alternate juror by lot, (2) by failing to give preclusive effect to a prior state court ruling which suppressed evidence, (3) in admitting evidence of prior bad acts, (4) in refusing to admit evidence of the dismissal of state criminal charges pertaining to his arrest, (5) in failing to give requested jury instructions, (6) in giving jury instructions he contends were improper, (7) in not permitting him to recall a medical expert witness who had testified, and (8) in refusing to exclude testimony by another medical expert. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I

FACTS

Heath and his brother, Larry Heath ("Larry"), were in a bar in Newport Beach, California. A police officer asked Larry for identification. When Larry failed to produce the identification, he was taken out of the bar by the officer. Heath protested the detention of his brother, Larry. An altercation with the police ensued and Heath was arrested. He was charged with interference with a police officer in the discharge of his duties (Cal. Penal Code § 148) and battery upon an officer (Cal. Penal Code § 243). In the subsequent criminal prosecution in state court, Heath moved to suppress any testimony by the police officers concerning the circumstances of his arrest from the time the officers first approached Larry in the bar. His motion was made under California Penal Code section 1538.5. The motion was

granted on the ground that in arresting Heath the police officers had acted without probable cause and had violated Heath's fourth amendment rights. After his suppression motion was granted, Heath moved to dismiss all of the state charges. The motion was unopposed by the prosecution. The state court granted the motion and the charges were dismissed. Heath then filed this civil rights action.

II

ANALYSIS

A. Seating Alternate Juror by Lot

After the regular jury was impaneled, two alternate jurors were selected. The trail transcript reflects the following with regard to this selection process:

> THE COURT: Now we need to get two alternate jurors. I'm going to suggest that the first name called take the first seat in the second row nearest to this end

of the jurybox, and the second alternate take the seat right next to the first one....

THE CLERK: Jesusa Basilio. B-a-s-i-l-i-o. First name spelled J-e-s-u-s-a. Again the last name is spelled B-a-s-i-l-i-o-.

THE COURT: Miss Basilio, if you are chosen, you will act as alternate juror. Let's get the second alternate first and then we will start the questioning.

THE CLERK: Sharon Schmitt. S-c-h-m-i-t-t. Sharon Schmitt...

(emphasis added)

The two alternate jurors, Ms. Basilio and Ms. Schmitt, were seated, respectively, where the first and second alternate jurors would sit during trial. Basilio, who had been called first, was excused for cause. Ms. Bolles was then called, seated in the first alternate

juror seat vacated by Basilio and questioned as the prospective first alternate. Only after the completion of Bolles' questioning was Schmitt questioned. Following the court's voir dire of the two alternates, the trial judge asked if either party wished to exercise a peremptory challenge. Neither party did, and Bolles and Schmitt were sworn in as the alternate jurors. Bolles remained in the first alternate seat and Schmitt in the second; they occupied these positions throughout the trial.

During the trial one of the regular jurors was excused because of illness. The trial judge proposed selecting one of the alternates to replace the excused juror by placing the nametags of Bolles and Schmitt in a metal box and drawing one out randomly. The following colloquy then occurred:

MR. YAGMAN: I believe the appropriate procedure is that Alternate Number One is be taken first, that there is not to be a drawing.

THE COURT: No, there is no Number One or Two. Alternate.

MR. YAGMAN: They were designated as One and Two, Your Honor. And the rules provide that that happens absent a stipulation. And there has been no signed stipulation.

THE COURT: I've never worked it that way. Alternates are alternates, and we draw.

MR. YAGMAN: I think the Federal Rules of Civil Procedure say they have to be taken in the order in which they were chosen.

THE COURT: All right. We are going to do it my way. Do you have any objection?

MR. FEELEY (defense counsel): No, Your Honor.

THE COURT: All right. (emphasis added).

In contending that the first alternate should be the replacement juror, Heath's counsel (Mr. Yagman) did not state whether he considered Bolles or Schmitt to be that individual. Over his objection, the court proceeded to draw by lot, and the nametag of Bolles was drawn. Bolles was then seated as a regular juror and the trial continued. Heath argues, as he did in his motion for a new trial, that the procedure followed by the district court in seating Bolles violated Federal Rule of Civil Procedure 47(b), that Schmitt should have replaced the ill juror, and that a new trial is required.

Violation of Rule 47(b)

Rule 47(b) provides in relevant part: "Alternate jurors in the order in which they

are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become ... unable ... to perform their duties." Fed. R. Civ. P. 47(b) (emphasis added). We review the district court's interpretation of this rule de novo, United States v. McConney, 728 F. 2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984). We conclude that the trial court erred in selecting the replacement juror by lot rather than by following the procedure prescribed by Rule 47(b). Schmitt was called ahead of Bolles and she should have been seated as a regular juror ahead of Bolles. The violation of the rule is clear. Use of the lottery system to select jurors is not permitted. See Fed. R. Civ. P. 47(b). The more difficult question is whether reversal is required.

Heath argues that the violation of Rule 47(b) was prejudicial. He points out that the Rule entitles each side to only one peremptory challenge when two alternate jurors are to be impaneled. He argues, with some force, that because the first alternate is more likely than the second to end up serving as a regular juror, counsel are more concerned about the first alternate and more likely to exercise their peremptory challenge to excuse a person being considered for that position. Accordingly, Heath says, to exercise Rule 47 rights effectively, a party must know which of two alternate jurors will be the first to replace a regular juror. He says that counsel might use different standards in determining whether to challenge a prospective juror depending on whether that juror is to be the first or second alternate.

In the circumstances of the case before us, the use of a lottery to select one of the two alternates as a replacement juror, while clearly erroneous, was also clearly harmless beyond a reasonable doubt. While a lottery should not have been used in the absence of a stipulatoin by both parties, its use here resulted in the selection of Bolles as the replacement juror. Bolles, as we have stated, was questioned first during voir dire and was seated, from the moment she stepped forward, in the chair designated for the first alternate. Moreover, in the initial process by which the alternates were selected, the court referred to Schmitt's status as that of "second alternate." And at the time of the lottery, Heath reminded the court of the earlier designation of the jurors as alternate one and alternate two. In sum, Bolles was treated by the court and by Heath as the de facto first alternate and

Schmitt was treated as the de facto second alternate during the entire trial up to the time of the lottery. Because it was Bolles who ultimately replaced the excused juror, the use of the lottery did not affect Heath's earlier decision not to exercise a peremptory challenge as to either Bolles or Schmitt. It is clear to us, therefore, that the error in seating Bolles as a regular juror did not affect the substantial rights of any party. Fed. R. Civ. P. 61. [1]

"While in a narrow sense Rule 61 applies only to the district courts, see Fed. R. Civ. Proc. 1, it is well settled that the appellate courts should act in accordance with the salutory policy embodied in Rule 61."

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1. Rule 61 provides:
No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the court or by any of the parties is ground for granting a new

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984). And as the Supreme Court stated in McDonough Power:

> "'[A litigant] is entitled to a fair trial but not a perfect one', for there are no perfect trials." (citations omitted). Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for

---

1. contd.

> trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgement or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61 (emphasis added).

society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing case load....

> We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "'citadels of technicality.'" (citations omitted). The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial....

Id. at 553, 104 S. Ct. at 848.

We conclude that in this case the district court did not commit reversible error, notwithstanding the violation of Rule 47(b). In so doing, we do not condone violations of the Rule and note that under different circumstances its violation might require a new trial.

B. Issue Preclusion

The gravamen of Heath's lawsuit is his contention that he was arrested without probable cause and that the police officers used excessive force to effect his arrest. He argues the grant of his motion to suppress evidence under California Penal Code section 1538.5 in his state criminal case precludes the litigation of the issues of probable cause and excessive force in this case. He bases this argument on the doctrine of collateral estoppel.

The availability of collateral estoppel is a mixed question of law and fact in which legal issues predominate. We review these issues de novo. Davis & Cox v. Summar Corp., 751 F.2d 1507, 1519 (9th Cir.1985). See United States v. McConney, 728 F. 2d 1195, 1202-04 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984). State law governs the doctrine of issue preclusion in federal courts. Takahashi v. Board of Trustees, 783 F. 2d 848, 850 (9th Cir.), cert. denied, ___ U.S. ___, 106 S. Ct. 2916, 91 L. Ed. 2d 545 (1986) (doctrine of collateral estoppel applies to section 1983 cases).

California courts apply a three-step analysis to determine whether collateral estoppel is applicable to a particular issue. First, there must be a final judgment on the merits. Second, the issue decided in the prior adjudication must be identical to the one

presented in the action in question. Third, the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, to the prior adjudication. Bernhard v. Bank of America, 19 Cal. 2d 807, 813, 122 P. 2d 892, 895 (1942) (citations omitted); Miller v. Superior Court, 168 Cal. App. 3d 376, 381, 214 Cal. Rptr. 125, 128 (1985).

Motions to suppress evidence under California Penal Code section 1538.5 are not considered final judgments under California law for purposes of collateral estoppel. People v. Gephart, 93 Cal. App. 3d 989, 156 Cal. Rptr. 489 (1979). In Gephart, defendants were convicted of armed robbery in Siskiyou County, California, after the superior court in that county refused to suppress evidence which had been ordered suppressed as a result of a section 1538.5 suppression motion made in a

prior prosecution of the defendants on different charges in the superior court in Stanislaus County, California. The charges in Stanislaus County were dismissed after the suppression motion was granted. The defendants argued that under principles of res judicata and collateral estoppel, the superior court in Siskiyou County was bound by the ruling suppressing evidence which had been made in Stanislaus County. The California Court of Appeal rejected this argument, holding that neither res judicata nor collateral estoppel were applicable because the prior ruling on the suppression motion in Stanislaus County made under California Penal Code section 1538.5 could not be considered a final judgment for purposes of either res judicata or collateral estoppel. "The determination on a motion under Penal Code section 1538.5 is a preliminary evidentiary determination and is independent of

the real question in the proceedings, that of the accused's guilt." Gephart, 93 Cal. App. 3d at 1000, 156 Cal. Rptr. at 495 (citation omitted). Compare Miller vs. Superior Court, 168 Cal. App. 3d 376, 214 Cal. Rptr. 125 (1985) (city collaterally estoppel in civil action from relitigating issue of whether plaintiff was raped by city police officer where officer had been convicted of raping plaintiff in prior criminal case; prior conviction was a final judgment).

Because an order suppressing evidence under California Penal Code section 1538.5 is not a final judgment on the merits, Heath has failed to satisfy the first requirement for the application of the doctrine of collateral estoppel. We need not, therefore, reach the questions of issue identity or privity. The district court properly refused to apply the doctrine of collateral estoppel.

C. Prior Bad Acts

Heath contends the district court erred in admitting evidence of his prior arrest by Newport Beach police officers and evidence of his brother's prior misdemeanor convictions resulting from arrests made by the same police agency. He argues the court improperly admitted this evidence to prove his character in violation of Federal Rule of Evidence 404 (b).[2] He further contends that even if the evidence was relevant to show bias against the Newport Beach police officers, the prejudicial

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2. Rule 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

effect of the evidence outweighed its probative value and the evidence should have been excluded under Rule 403 of the Federal Rules of Evidence.[3]

We first consider whether the trial court abused its discretion in determining that this evidence of prior bad acts was relevant to the issue of bias of Heath and his brother against the Newport Beach police, and admissible under Rule 404(b). At trial, Heath agreed to stipulate that he and his brother were biased against the police officers. He argues it was error for the court to admit the evidence for the purpose of showing bias when he was willing to stipulate to the very bias the evidence was offered to show.

---

3. Rule 403 provides in part:
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...

"Rule 404(b) is 'one of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition.'" United States v. Sangrey, 586 F. 2d 1312, 1314 (9th Cir. 1978) (quoting United States v. Rocha, 553 F. 2d 615, 616 (9th Cir. 1977)) (emphasis in original). Evidence of Heath's prior arrest, and of his brother's prior misdemeanor convictions, were probative of their bias against the Newport Beach police and of Heath's motive in bringing this action. The jurors, as sole triers of fact and credibility, were entitled to hear the evidence and decide the extent of that bias. A stipulation simply that bias exists precludes the jury from assessing the degree of bias. The trial court did not abuse its discretion in admitting this evidence notwithstanding Heath's proposed stipulation.

We next consider whether the trial court erred in determing under Federal Rule of Evidence 403 that the probative value of the evidence of prior bad acts was not substantially outweighed by the danger of prejudice from the admission of that evidence. It appears from the trial record that the probative value and prejudicial effect of the evidence were adequately weighed by the court before the evidence was admitted. The court also gave the jury a limiting instruction with respect to this evidence.[4]

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4. Heath was asked on cross-examination: "Directing your attention now to the date of February 16, 1983 [the prior arrest], on that occasion did a Newport Beach police officer arrest you for being intoxicated in public?" Before Heath could answer, the court interrupted the cross-examination and instructed the jury:

> Any evidence of a February 26, 1983 contact between plaintiff and officers of the Newport Beach Police Department is received and may be considered only for a limited

Evidentiary rulings are reviewed for abuse of discretion. Coursen v. A. H. Robins, 764 F.2d 1329, 1333 (9th Cir. 1985). The district court did not abuse its discretion in admitting the evidence of prior bad acts.

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4. (cont'd.)

> purpose, to show, to the extent it does tend to show, any bias or prejudice of the plaintiff toward the Newport Beach Police Department.
>
> In short, it is received only insofar as it may tend to reflect on the credibility of plaintiff's testimony and not for any other purpose.
>
> Specifically, it may not be used to show that the plaintiff acted in any particular way on the date of the incident in question.
>
> And, further, you should understand that any such evidence is not used to show any character trait of the plaintiff or that he was or was not guilty in fact of the offense for which he was arrested, if he was arrested on another occasion.
>
> Again, the purposes of the evidence is limited to your consideration of the question of bias, if any, of the plaintiff against the Newport Beach Police Department insofar as it tends to show such.

D. Evidence of Dismissal of Criminal Charges

Heath contends the district court erred in failing to admit evidence of the state court's dismissal of the criminal charges against him. He argues it was unfair and asymmetrical to admit evidence of his prior arrest, but reject evidence that the criminal charges relating to his more recent arrest which was the subject of the present lawsuit had been dismissed. The trial court considered this argument, weighed the relevant factors, and determined that evidence of dismissal of the criminal charges would be more prejudicial than probative. The criminal charges had been dismissed on Heath's motion, unopposed by the prosecution, following the state court's ruling suppressing testimony by the arresting officers. The dismissal did not establish Heath's innocence nor was it probative of whether the officers acted with probable cause or used

excessive force in effecting Heath's arrest. The district court did not abuse its discretion in rejecting this evidence. Fed. R. Evid. 403.

E. Jury Instructions

Heath argues the court erred in refusing to give the following instruction to the jury:

> If you should find that a party willfully suppressed evidence in order to prevent its being presented in this trial, you may consider such suppression in determining what inferences to draw from the evidence or facts in the case against him.[5]

He contends the defendants intentionally suppressed initial reports of the defendants' two expert medical witnesses, Doctors Sharma and Petersons, and that the identity of two other witnesses was concealed from him.

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5. This instruction is taken from California's standard BAJI Instruction 2.03. There is no comparable standard instruction for use in civil cases in federal court. See E. Devitt & C.

The record reveals that Heath must have known of the existence of Dr. Sharma's initial report during pretrial discovery because it was referred to in a subsequent report by Dr. Sharma which had been provided to Heath. As to Dr. Petersons' initial report, that was furnished to Heath sufficiently in advance of Dr. Petersons' examination to permit effective cross-examination. Finally, the names of the witnesses Heath claims were concealed were disclosed during trial and the district court recessed the trial to permit Heath to depose them. He did so, and then did not call either of them as a witness. No evidence was suppressed and the court did not err in refusing to give Heath's requested willful

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5. (cont'd.)
Blackmar, Federal Jury Practice and Instructions, § 72.19 (3d ed. 1977 7 Supp. 1986). In California it is prejudicial error to give BAJI 2.03 if there is no showing that evidence has been at least willfully, and perhaps fraudulently,

suppression of evidence instruction. See United States v. Wellington, 754 F. 2d 1457, 1463 (9th Cir.), cert. denied, ___ U.S. ___, 106 S. Ct. 593, 88 L. Ed. 2d 573 (1985) (trial court has broad discretion in formulating jury instructions and will be reversed only upon a showing of abuse of discretion); compare 999 v. CIT Corp., 776 F. 2d 866, 871 (9th Cir. 1985) (the claim that a court failed to give the jury a proper jury instruction is a question of law reviewable de novo). Under either standard, the district court did not err in refusing to give the requested instruction.

Heath also contends the district court committed error in failing to give instructions

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5. (cont'd.)
suppressed. See County of Cotra Costa v. Nulty, 237 Cal. App. 2d 593, 47 Cal. Rptr. 109 (1965).

which he requested pertaining to probable cause, use of excessive force, and defining an "arrest". These claims are without merit. A court is not required to instruct the jury in words chosen by a party nor to incorporate every proposition of law a party suggests. It is sufficient if the instructions as given allow the jury to determine intelligently the issues presented. Los Angeles Memorial Coliseum Commission v. National Football League, 726 F. 2d 1381, 1398 (9th Cir.), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984). Considering the instructions as a whole, the jury was adequately instructed on each element of the case and the instructions given by the trial judge accurately reflect controlling law. Id.

Heath's contention that the district court erred in giving an instruction on the officers' good faith is also without merit. The just of this argument is that the officers' good faith

is relevant only in connection with a defense of qualified immunity and Heath contends that defense is not available in this case. He's wrong in this connection. We have recently held that "[t]he qualified immunity defense is available in cases of unlawful arrest." Hamblen v. County of Los Angeles, 803 F. 2d 462, 465 (9th Cir. 1986) (citations omitted). And in any event only one jury instruction included the words "good faith," and that instruction concerned the issue of punitive damages, not qualified immunity.[6]

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6. That instruction reads:

> The defendants contend that on or about the date and at the time and place alleged, certain defendants did arrest the plaintiff with probable cause to do so and used reasonable force to effect his arrest. But defendants deny that any conduct or act of theirs deprived the plaintiff of any right or privilege or immunity secured to him by the Constitution or laws of the United States and further deny that plaintiff was injured as a result of any unlawful act or conduct by the defendants or that plaintiff was injured or damaged in the

F. The Medical Expert Witnesses

The defense had two medical expert witnesses: Dr. Sharma, a psychiatrist, and Dr. Petersons, a neurosurgeon. Both of these doctors examined Heath on two separate occasions. Each prepared an initial report and a subsequent report. During the discovery phase of the case, the magistrate ordered all defense medical reports turned over to Heath. The defense turned over the second reports, but did not turn over the initial reports. These initial reports were furnished to Heath's counsel at the time of trial.

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6. (cont'd.)
amount or sum claimed by him or any other sum or amount. And they also deny that any act or conduct of the defendants toward plaintiff was malicious or wanton or oppressively done. And in this connection defendants allege that all of their acts and conduct of which the plaintiff complaints were done in good faith in the pursuant of the defendants' lawful authority and lawful duty as a police officer. (emphasis added).

1. Court's Refusal to Recall Dr. Sharma

Dr. Sharma testified and was excused. Thereafter, Heath's counsel claimed he learned of the existence of Dr. Sharma's initial medical report only after Sharma had completed his testimony. He requested permission to recall Dr. Sharma so that Sharma could be cross-examined on his initial report. The district court refused to permit Heath to recall Sharma. The court found that Heath's counsel must have been aware of the existence of Sharma's initial report during the discovery phase of the litigation and rejected Heath's claim of surprise. Heath's counsel was then permitted to read into the record, before the jury, a paragraph from Dr. Sharma's report which Heath contended impeached Sharma.

The defense may have disobeyed a discovery order in failing to run over Sharma's initial report earlier, but the district court

did not abuse its discretion in refusing to permit Heath to recall Sharma. Since Heath had adequate notice of the existence of the initial Sharma report during the discovery phase of the litigation, he could have moved to compel into production and neglected to do so. See Peraza v. Delameter, 722 F. 2d 1455, 1456 (9th Cir. 1984).

2. Court's Refusal to Exclude Dr. Petersons' Testimony

Heath's counsel was provided with a copy of Dr. Petersons' initial report before Peterson testified. Heath contends, however, that because the defense failed to turn over this report until the time of trial he was "deprived of an opportunity to evaluate the report and to effectively question Petersons because [he] had no opportunity to read, digest, and evaluate that report, and then to consult with appropriate experts to formulate

questions for Petersons." The record reflects, however, that Dr. Petersons was present and ready to testify at the trial on Friday, November 8, 1985. When Heath's counsel became aware of the existence of Dr. Petersons' initial report, he moved to exclude Petersons' testimony based upon his claims that failure to provide the report violated the magistrate's discovery order in the cases. The district court refused to exclude Dr. Petersons' testimony because to have done so would have been to severe a sanction, even if the discovery order had been violated. The district court then continued the trial to the following Tuesday, November 12th, so that Heath's counsel could review Petersons' initial report and consult with his own expert. Heath's medical expert was scheduled to testify at 9:00 a.m. on November 12th. Dr. Petersons'

testimony was rescheduled to 1:30 p.m. on November 12th. Heath's argument that he was denied the opportunity to review Dr. Petersons' initial report and consult with his own medical expert in advance of examining Petersons is without merit. That simply did not occur. The trial court did not abuse its discretion in refusing to exclude Dr. Petersons' testimony. AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE MC KINLEY Plaintiff/Appellant, vs. CITY OF RIVERSIDE, RICHARD M. CANALE, THOMAS R. BUCKINGHAM, KEITH V. MC CAULEY, RALPH MOORHOUSE, and WILLIAM EDENHOFER, Defendants/Appellees.	CV-81-6208-AAH MEMORANDUM* FILED JUNE 3, 1987

Appeal from the United States District Court for the Central District of California.
Andrew A. Hauk, District Judge, Presiding

Submitted May 13, 1987**

BEFORE: ANDERSON, PREGERSON, and NOONAN, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a) and Ninth Cir. Rule 3(f).

Appellant McKinely presses three claims on appeal from an adverse jury verdict in his civil rights action under 42 U.S.C. § 1983: (1) that the defendants did not have available to them the defense of qualified immunity, (2) that they inadequately raised the defense in their responsive pleadings, (3) that the judge failed to adequately instruct the jury by introducing the subjective element of good faith into the defense. We reject all three contentions.

First, McKinley claims that where the law is clearly established, the defense of qualified immunity should fail as a matter of law, citing Harlow v. Fitzgerald, 457 U.S. 800 (1982).

McKinley points out that the law on unlawful seizures and illegal arrests was already well-established when the officers acted. This Court has held, however, that the

defense is available when the defendants "acted under a reasonable belief that [they were] doing right" even though applicable constitutional standards were "sufficiently well-established." Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, at 1466-1467 (9th Cir. 1984). Second, the pleadings adequately, though inartfully raised the defense. Finally, Harlow itself demands both an actual lack of knowledge of unconstitutional conduct and an objectively reasonable belief that the actions taken were not unconstitutional. Harlow, at 819. Both subjective and objective elements are injected into the elements of the qualified immunity defense. The trial judge properly instructed the jury that the defendants must have "reasonably believed" that he was acting in conformity with the law and that they acted "in good faith on this belief."

AFFIRMED.

87 77

No. 85-6571

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

DR. ROBERT HEATH,
Petitioner,

VS.

DOUGLAS CAST, ROBERT HARDY, JOSEPH BROWN, and PETE PERRIN,
Respondents.

WILLIE MCKINLEY,
Petitioner,

VS.

CITY OF RIVERSIDE, RICHARD CANEALE, THOMAS BUCKINGHAM, KEITH MCCAULEY, RALPH MOOREHOUSE, WILLIAM EDENHOFER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals appears in *Heath v. Cast*, 814 F.2d ____ (9th Cir. 1987) and is included herein as Appendix A.

JURISDICTION

Respondents agree with petitioner's position regarding the timeliness of the filing of the petition. Respondents are also in agreement that cases in the Courts of Appeals may be reviewed by the Supreme Court by writ of certiorari pursuant to Rule 1254(1).

QUESTIONS PRESENTED

1. The questions here presented may be stated as follows:

1. Whether respondent police officers were entitled to assert the affirmative defense of good faith immunity and whether the jury was properly instructed by the Court as to this defense at time of trial.

2. Are respondents entitled to assert the qualified good faith immunity defense even though the law with respect to unreasonable searches and excessive force was clearly established at the time of the alleged violation?

3. Is there any evidence that the method utilized by the District Court in selecting an alternate juror prejudiced the petitioner in the outcome of his action?

4. Does a preliminary evidentiary determination on a motion to suppress made in a state criminal action preclude the litigation of the issues of probable cause and excessive force in the subsequent civil action in the District Court?

5. Whether evidence of prior arrests and convictions are admissible in order to demonstrate bias against law enforcement officials.

STATEMENT OF THE CASE

1. The facts of the case underlying the petition for certiorari are as follows:

The incident on which *Heath v. Cast* is based occurred on the evening of June 24-25, 1983, in Newport Beach, California. Respondents, police officers of the City of Newport Beach in the course of their duties, entered the Stag Bar in order to conduct a routine check of the premises. (R.T. 2-29, lines 10 to 25; R.T. 2-30, line 17.) While inside the bar, respondents observed petitioner's brother, Larry Heath, who appeared to be drunk in public, in violation of California Penal Code section 647(f). (R.T. 8-141, lines 22 to 25; R.T. 8-142, lines 1 to 18.)

Based upon the officers' observation of Larry Heath's intoxicated state, respondents attempted to detain the suspect for his own safety and the safety of others. At that point in time, petitioner interfered with respondents' duties when the officers attempted to detain Larry Heath. Petitioner's interference with the officers included verbal harassment and physical assault. Robert Heath endeavored to release his brother from the custody of Officer Cast. In response, respondents attempted to place petitioner under arrest for interference with police officers in the discharge of their duties. When Officer Hardy attempted to take control of petitioner, Dr. Heath resisted and fought any attempt to be subdued. He was in an out-of-control frenzy. A physical altercation ensued during the course of which petitioner alleges he was beaten by respondents. (R.T. 2-168, lines 3 to 25; R.T. 2-169, lines 1 to 2; R.T. 2-92, lines 18 to 25; R.T. 2-104, lines 5 to 11.) After further struggle, plaintiff was placed under arrest for assault and battery on a peace officer and interference with a police officer in the performance of his duties.

Criminal charges were filed against plaintiff by the Orange County District Attorney (*People v. Heath* — Case No. M 12 5460). Counsel for Heath in the criminal prosecution filed a motion to suppress evidence under California Penal Code section 1538.5, which was granted. Thereafter, the criminal proceeding was dismissed on motion of the prosecutor as against Heath, pursuant to California Penal Code section 1385.

Petitioner filed a civil action, pursuant to the United States Constitution and 42 U.S.C. 1983, alleging that respondents, as officers of the City of Newport Beach Police Department, violated rights guaranteed to him by the Fourth and Fourteenth Amendments to the United States Constitution in the course of an arrest. (C.R.-1.) The action is entitled *Dr. Robert Heath v. Douglas Cast, et al.*, No. 85-6571. This action was filed in the United States District Court, Central District of California.

Prior to trial, plaintiff moved for summary adjudication of issues, contending that findings in the criminal prosecution which was based on the arrest of petitioner precluded adjudication in the District Court of certain issues regarding the legality of plaintiff's arrest. (C.R.-24.) Said motion was denied by the District Court. (C.R.-38.) Plaintiff's subsequent motion for reconsideration was also denied. (C.R.-53.)

The jury trial of this matter resulted in a unanimous verdict for the defendants. (C.R.-71.) A special verdict was returned in favor of each of the defendant officers, finding that plaintiff had not been deprived of his constitutional rights by being arrested by any of the defendants without probable cause. (C.R.-70.) Judgment was entered by the Court in favor of the defendants pursuant to said verdict. (C.R.-74.)

SUMMARY OF ARGUMENT

1. Respondents are entitled to assert the affirmative defense of good faith immunity and the jury was properly instructed by the Court as to this defense at time of trial. Good faith immunity is available to police officers in 1983 actions. According to *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Petitioner was lawfully arrested for willfully interfering with a police officer in the discharge of his duties pursuant to California Penal Code section 148. The jury at the trial of *Heath v. Cast* found that petitioner had not been deprived of his constitutional rights during the course of his arrest. Petitioners are entitled to avail themselves of the defense of qualified immunity in an action alleging both lawful arrest, *Pierson v. Ray,* 386 U.S. 547 (1967) and excessive force, *Peraza v. Delameter,* 722 F.2d 1455 (9th Cir. 1984).

2. Respondents are entitled to assert the qualified/good faith immunity defense even though the law with respect to unreasonable searches and excessive force is clearly established at the time of the alleged violation. The qualified immunity defense is clearly available in cases of unlawful arrest and excessive force. Petitioner's bare legal conclusion that respondents are not entitled to this affirmative defense is unsupported by either factual assertions or authority.

3. There is no evidence that the method utilized by the District Court selecting an alternate juror prejudiced the petitioner in the outcome of this action. A slight deviation

in the method of selecting jurors constitutes harmless error if petitioner fails to show prejudice in the method used to select the jury. After the District Court's voir dire questioning of Ms. Bolles, the alternate juror in question, the Court informed counsel for both petitioner and respondents that they each had one additional peremptory challenge on the two alternate jurors selected, pursuant to Federal Rules of Civil Procedure 47(b). Petitioner's counsel passed the peremptory challenge as to both alternate jurors, even though he had the opportunity to excuse either alternate for any reason whatsoever.

4. A preliminary evidentiary determination in petitioner's state criminal action did not preclude the litigation issues of probable cause and excessive force in the subsequent civil action in the Federal District Court. State law governs the doctrine of issue preclusion in federal courts. The court in *People v. Gephart*, 93 Cal.App.3d 989 (1979) found that the grant of a motion to suppress is not considered a final judgment under California law for purposes of collateral estoppel. Such a determination pursuant to Penal Code section 1538.5 is a preliminary evidentiary determination and is independent of the real question in the proceedings, that of the accused guilt. The Court stated that it did not belive the Legislature intended to give such a determination conclusive effect beyond the proceedings in which the defendant is involved at the time of the determination.

5. Evidence of prior arrests and convictions are admissible in order to demonstrate bias against law enforcement officials. Federal Rule of Evidence 404(b) permits the admissibility of other crimes, wrongs or acts for the purpose of demonstrating proof of motive. Rule 404(b) is one of inclusion which admits evidence of other crimes or acts relevant to the issue in the trial, except where it

tends to prove only criminal disposition. The District Court gave the jury a limiting instruction with respect to evidence concerning petitioner's prior arrest by Newport Beach Police Officers and evidence of his brother's misdemeanor convictions resulting from arrests made by the same police agency. Such evidence is probative of petitioner's bias against the Newport Beach Police and his motive in bringing this action.

ARGUMENT

I.

RESPONDENTS WERE ENTITLED TO ASSERT THE AFFIRMATIVE DEFENSE OF GOOD FAITH IMMUNITY AND THE JURY WAS PROPERLY INSTRUCTED BY THE COURT AS TO THIS DEFENSE AT TIME OF TRIAL.

The affirmative defense of qualified immunity/good faith was properly pleaded by and applied to the respondents in *Heath v. Cast.* The landmark case on this issue of qualified immunity is *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Supreme Court concluded that:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established rights."

As officers of the Newport Beach Police Department on routine patrol, respondents were able to demonstrate to the trial court that they were in fact government officials performing discretionary functions. Further, respondents' conduct did not violate petitioners' clearly established constitutional rights.

As police officers, respondents were able to avail themselves of the qualified/good faith immunity defense. In *Escamillo v. City of Santa Ana,* 606 F. Supp. 928 (9th Cir. 1985) the court succinctly stated:

> "Good faith immunity is a qualified federal immunity and available to police officers in 1983 actions."

In the recent case of *Kremhelmer v. Powers,* 633 F.Supp. 1145 (L.D. Mich. 1986) the court discussed the applicability of the good faith immunity to police officers involved in suits for damages arising out of their official acts and the manner in which the good faith of a government official is to be tested. The court stated:

> "Police officers are entitled to qualified or 'good faith immunity' from suits for damages arising out of their official acts. (Citation omitted.) The Supreme Court in *Harlow v. Fitzgerald* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), held that the good faith of the government official who is performing discretionary functions is to be tested by a purely 'objective' standard. (Citation omitted.) The *Harlow* court held that 'government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' 457 U.S. at 818."

The court continued:

> "Applying *Harlow,* the threshold question to be answered in this case is whether the alleged conduct of defendant was so illegal as to violate clearly established law. *Harlow* suggests a two-step analysis: First, what, if any, was the clearly established law at that time, and second, did defendant violate that law

while performing a discretionary function within the scope of his employment as a government official?"

The following were clearly established laws at the time of petitioner's arrest on June 24-25, 1983:

California Penal Code section 647(f) states in pertinent part:

> "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> . . .
>
> (f) who is found in any public place under the influence of intoxicating liquor, any drug, toluene, any substance defined as a poison in Schedule D of section 4160 of the Business and Professions Code, or any combination of any intoxicating liquor, drug, toluene, or any such poison, in such a condition that he is unable to exercise care for his own safety or the safety of others. . . ."

California Penal Code section 647(ff) provides:

> "When a person has violated subsection (f) of this section, a peace officer, if he is reasonably able to do so, shall place the person, or cause him to be placed, in civil protective custody."

Section 647(ff) further provides:

> "A peace officer may place a person in civil protective custody with that kind and degree of force which would be lawful were he effecting an arrest for a misdemeanor without a warrant."

California Penal Code section 148 provides:

> "Every person who willfully resists, delays, or obstructs any public officer or a police officer, in the discharge or attempt to discharge any duty of his office, where no other punishment is prescribed, is punishable by a fine not exceeding one thousand

> dollars ($1,000.00), or by imprisonment in the County jail not exceeding one year, or by both such fine and imprisonment."

Further, under federal and state law and the United States Constitution, a citizen is entitled to be free from unreasonable seizures and the use of excessive force.

While effectuating the arrest of petitioner, respondents were not in violation of any clearly established law. As a result of the police officers' observation of Larry Heath's intoxication, respondents' had probable cause to believe that he was in violation of the Penal Code. When respondents attempted to detain Larry Heath as a result of the foregoing probable cause, the petitioner interfered. This willful action resulted in petitioner's violation of the crime of interference with a police officer in the performance of his duties.

As discussed above, at the trial in the District Court, the jury returned a special verdict in favor of each of the officers finding that petitioner had not been deprived of his constitutional rights by being arrested without probable cause. (C.R.-70.) In essence, the jury found that the arrest of petitioner was properly carried out pursuant to Penal Code section 148 and that the petitioner's constitutional rights had not been violated. The verdict demonstrated that all respondents had justifiably asserted the defense of good faith immunity and that the District Court properly instructed the jury accordingly. As discussed in the next section, contrary to petitioner's position throughout this litigation, respondent police officers may assert the affirmative defense of good faith immunity even though the laws which were allegedly violated were clearly established. Respondents' acts of detaining both petitioner and his brother were in accordance with the laws as set forth in the California Penal Code and the

Fourth and Fourteenth Amendments of the United States Constitution.

II.

PETITIONERS' ASSERTION THAT DEFENDANTS ARE NOT ENTITLED TO A GOOD FAITH/IMMUNITY DEFENSE BECAUSE THE LAW WITH RESPECT TO UNREASONABLE SEIZURES AND EXCESSIVE FORCE WAS CLEARLY ESTABLISHED AT THE TIME OF THE ALLEGED VIOLATION IS WHOLLY WITHOUT MERIT.

Petitioners' position as to the applicability of the good faith/qualified defense has been made time and time again by his attorney in numerous other civil rights actions brought against police officers. The gist of the argument in the *Heath* case, the *McKinley* action and in the countless others cases is that respondents are not entitled to the good faith/qualified immunity defense because the law with respect to unreasonable seizures and excessive force is clearly established at the time of the alleged violation. Petitioner sets forth no reasons, facts, or authority for this conclusory statement.

The United States Court of Appeals, Ninth District, found fault with this same argument when it was set forth by petitioner's counsel, Mr. Stephen Yagman, in *Hamblen v. County of Los Angeles,* 803 F.2d 462 (9th Cir. 1986). The court admonished Mr. Yagman as follows:

> "... Yagman's wholesale disregard of the rules of appellate procedure-and those of common sense-makes it impossible for us or opposing counsel to deal with the merits of appellant's contentions. Aside from its form, the substance of the brief is irresponsi-

bly frivolous. As best we can gather from the two-page portion that Yagman labels legal argument, he claims that defendants are not entitled to a good faith/qualified immunity defense because the law with respect to unreasonable seizures and excessive force was clearly established at the time of the alleged violation. Yagman gives nor reason, let alone supporting authority, for his contention that the law was clear in these circumstances. In fact, he neglects to describe the circumstances. Therefore, his contention, if anything, must be that the law is clearly established in all cases alleging unreasonable seizure and excessive force.

This argument, if it is indeed what Yagman claims, cannot survive in the face of clear authority that the qualified immunity defense is available in cases of unlawful arrest, *Pierson v. Ray,* 386 U.S. 547, 555-57, 87 S.Ct. 1213, 1218-19, 18 L.Ed.2d 288 (1967), and excessive force, *Peraza v. Delameter,* 722 F.2d 1455, 1457 (9th Cir. 1984). *Accord Bledsoe v. Garcia,* 742 F.2d 1237, 1239-40 (10th Cir. 1984); *Landrum v. Moats,* 476 F.2d 1320, 1327 (8th Cir.) cert. den., 439 U.S. 912, 99 S.Ct. 282, 52 L.Ed.2d 258 (1978). Yagman fails to address or even mention these precedents. His entire argument, consisting of bare legal conclusions and fragmented, unsupported factual assertions, is a textbook example of feckless lawyering. It put the appellees to unnecessary and unwarranted expense in preparing responses and appearing at oral argument.

Appellees are entitled to attorney's fees and double costs on this appeal, to be paid by Yagman and his firm, and not to be charged to appellant. (Citations omitted.) In addition, the clerk is directed to send

> this opinion directly to appellant *Hamblen*. Finally, we take this opportunity to advise Mr. Yagman that continued failure to abide by the laws of this Court may result in formal disciplinary proceedings. (Citations omitted.)"

The *Hamblen* action is analogous to *Heath v. Cast*. In each instance, plaintiff filed suit under 42 U.S.C. section 1983 alleging his civil rights were violated by unreasonable seizure and excessive force. At time of trial, defendant law enforcement officers, as was their right, submitted a jury instruction asserting the defense of good faith/qualified immunity. Plaintiffs objected to such an instruction on the ground that the law with respect to unreasonable seizures and excessive force was 'clearly established'. As discussed above, the *Hamblen* court found plaintiffs' conclusory objection totally lacking in merit and held that the qualified immunity defense is available in cases of alleged unlawful arrest and excessive force even when the law is clearly established.

III.

THERE IS NO EVIDENCE THAT THE METHOD UTILIZED BY THE DISTRICT COURT IN SELECTING AN ALTERNATE JUROR PREJUDICE THE PETITIONER IN THE OUTCOME OF HIS ACTION.

Petitioner has failed to demonstrate that the selection of an alternate juror by lot prejudiced his action. Slight deviation in the method of selecting jurors constitutes harmless error if respondent fails to show prejudice in the method used to select the jury. *Hollman v. Brady,* 233 F.2d 877 (9th Cir. 1956).

This issue concerning the selection of an alternate juror and whether the method utilized by the District Court prejudiced petitioner warrants a discussion of the applicable federal rules.

Federal Rule of Civil Procedure 47(b) states in pertinent part:

> "Alternate jurors shall be drawn in the same manner, shall have the same qualifications, and shall be subject to the same examination and challenges, and shall take the same oath, and shall have the same functions, powers, facilities, and privileges, as the regular jurors. An alternate juror that does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be empanelled. . ."

According to Federal Rule of Civil Procedure 61:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

A deviation from Rule 47(b) must be viewed in terms of the provisions of Rule 61. Rule 47(b) provides that alternate jurors shall replace jurors in the order in which they are called. The District Court in *Heath v. Cast*

departed from the requisites of Rule 47(b) by selecting the alternate by lot, rather than in the order in which she was called. Petitioner claims that this departure from normal procedure was prejudicial error. The Court of Appeal found the deviation to be a harmless error.

The facts as set forth in the trial transcript clearly demonstrate that the District Court's selection of an alternate juror (R.T. 1-45 to 50) did not in any way prejudice the outcome of *Heath v. Cast.* After the jury was empanelled, two alternates were selected from the pool of venireman in the courtroom. Ms. Basilio was seated as the prospective first alternate and Ms. Schmitt as the second alternate. In response to the Court's voir dire questioning, Ms. Basilio stated that she felt she could not be a fair juror in the case, whereupon the Court excused her for cause. Then Ms. Bolles' name was drawn and she was seated as the new prospective first alternate juror (taking the place of Basilio). After the Court's voir dire questioning of Ms. Bolles and then Ms. Schmitt was completed, the Court informed counsel for petitioner and respondents that they each had one additional peremptory challenge on the alternates, pursuant to Federal Rules of Civil Procedure 47(b). Petitioner's counsel passed the peremptory challenge as to Bolles and Schmitt. In other words, even though petitioner had the opportunity to excuse either Bolles or Schmitt for any reason whatsoever, he chose to empanel each of them, leaving his peremptory challenge unused. This decision was reached knowing full well that pursuant to Rule 47(b) alternate jurors have the same function, powers, facilities and privileges as the regular jurors.

On November 12, 1985, a regular juror was excused due to illness. Ms. Bolles, alternate juror number one who took Basilio's chair when she was excused, was chosen by

means of a lot to replace the regular juror. The District Court's slight deviation from Rule 47(b) resulted in nothing more than the first alternate juror, who was previously fully examined and was not excused by way of an available and unused peremptory challenge, taking the place of an excused juror. Petitioner calls upon this Court to reverse the Court of Appeal's finding that the failure to follow the exact provisions of 47(b) was harmless error.

The United States Court of Appeals, Ninth Circuit, in their opinion in *Heath v. Cast*, 814 F.2d ____ (9th Cir. 1987) found:

> "In the circumstances of the case before us, the use of a lottery to select one of the two alternates as a replacement juror, while clearly erroneous, was also clearly harmless beyond a reasonable doubt. While the lottery should have not been used in the absence of a stipulation by both parties, its use here resulted in the selection of Bolles as a replacement juror. Bolles, as we have stated, was questioned first during *voir dire* and was seated, from the moment she stepped forward, in the chair designated for the first alternate. Moreover, in the initial process by which the alternates were selected, the court referred to Schmitt's status as the 'second alternate' and at the time of the lottery, Heath reminded the court of the earlier designation of the jurors as alternate one and alternate two. In sum, Bolles was treated by the court in *Heath* as the *de facto* first alternate and Schmitt was treated as the *de facto* second alternate during the entire trial up to the time of the lottery. Because it was Bolles who ultimately replaced the excused juror, the use of the lottery did not affect Heath's decision not to exercise a peremptory challenge as to either Bolles or Schmitt. It is clear to us,

> therefore, that the error in seating Bolles as a regular juror did not affect the substantial rights of any party. (Fed. R. Civ. P. 1.)"

The Court of Appeals cited from the United States Supreme Court's decision in *McDonough Power Equipment, Inc. v. Greenwood,* 64 U.S. 548 (1984) as follows:

> " 'A litigant is entitled to a fair trial but not a perfect one,' for there are no perfect trials. Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload . . .
>
> We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered 'citadels of technicality'. (Citation omitted.) The harmless error rule adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of trial . . ."

In conclusion, since petitioner has failed to set forth any facts demonstrating that the outcome of *Heath v. Cast* was prejudiced by the replacement of an excused juror with the first alternate juror, who petitioner chose not to challenge, the Court of Appeals' decision on this issue should not be disturbed.

IV.

A PRELIMINARY EVIDENTIARY DETERMINATION ON A MOTION TO SUPPRESS IN THE PETITIONER'S CRIMINAL ACTION DID NOT PRECLUDE THE LITIGATION OF THE ISSUE OF PROBABLE CAUSE AND EXCESSIVE FORCE IN THE SUBSEQUENT CIVIL ACTION IN THE DISTRICT COURT.

Petitioner argued both at trial and in the Court of Appeal that the issues of probable cause and excessive force should have been precluded from litigation at the trial level as a result of the grant of his motion to suppress evidence under California Penal Code section 1538.5 in the prior state criminal case. Petitioner is contending that respondents were collaterally estopped from litigating these issues in the District Court on the basis of a state criminal court's preliminary evidentiary determination.

State law governs the doctrine of issue preclusion in federal courts. *Takahashi v. Board of Trustees,* 783 F.2d 848 (9th Cir. 1986). The California courts have specifically addressed the issues of collateral estoppel and issue preclusion.

In *Bernhard v. Bank of America,* 19 Cal.2d 807 (1942), the court used a three-part test to determine whether collateral estoppel was applicable to a particular issue. First, there must be a final judgment on the merits. Second, the issues cited in the prior adjudication must be identical to the one presented in the action in question. Third, the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, to the prior adjudication.

The court in *People v. Gephart,* 93 Cal.App.3d 989 (1979) discussed the effect on subsequent actions of granting a motion to suppress evidence under California Penal Code section 1538.5. The court found that such motions to suppress are not considered final judgments under California law for purposes of collateral estoppel. The court stated in pertinent part:

> "The determination on a motion under Penal Code section 1538.5 is a preliminary evidentiary determination and is independent of the real question in the proceedings, that of the excused guilt."

The court further stated:

> "We do not believe that the Legislature intended to give the determination conclusive effect beyond the proceedings in which the defendant is involved at the time of the determination."

The United States Court of Appeals, Ninth Circuit, in *Heath v. Cast, supra* addressed the issue as to whether granting Dr. Heath's motion to suppress in his criminal case precluded the litigation of the issue of probable cause and excessive force in the subsequent civil action under the doctrine of collateral estoppel. The Court of Appeals concluded:

> "Because an order suppressing evidence under California Penal Code section 1538.5 is not a final judgment on the merits, *Heath* has failed to satisfy the first requirement for the application of the doctrine of collateral estoppel. We need not, therefore, reach the decisions of issue identity or privity. The District Court properly refused to apply the doctrine of collateral estoppel."

Petitioner has failed to present any persuasive authority or argument to warrant this challenge to the well

reasoned and amply supported decision of the Court of Appeals on this question.

V.

EVIDENCE OF PRIOR ARRESTS AND CONVICTIONS ARE ADMISSIBLE IN ORDER TO DEMONSTRATE BIAS AGAINST LAW ENFORCEMENT OFFICIALS.

Evidence of Heath's prior arrest and his brother's prior misdemeanor convictions were probative of their bias against the Newport Beach Police Officers and of Heath's motive in bringing suit against respondent police officers. The court in *United States v. Garza,* 754 F.2d 1202 (5th Cir. 1985) stated in pertinent part:

> "Evidence of past arrests, past involvement with the police in general and defendants in particular, would be pertinent in the jury's essential determination of credibility. Such evidence would be relevant to the issue of bias, prejudice or ulterior motive of the witness. (Citations omitted.) In *United States v. Croucher,* 532 F.2d 1042, 1045 (5th Cir. 1976) we held that 'the issue of the witness' relationship with both state and federal law enforcement officials, in connection with his participation in this case, was highly relevant to his credibility as a witness for the prosecution."

The admissibility of evidence showing bias against respondents and Heath's motive for bringing suit is in accordance with the Federal Rules of Evidence. Federal Rule of Evidence 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for

other purposes, such as proof of *motive,* opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The court in *United States v. Sangrey,* 586 F.2d 1312 (9th Cir. 1978) discussed the presentation of evidence of other crimes and the proper safeguards which should accompany its admissibility. The court noted:

> "404(b) is 'one of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition. (Citations omitted.) This 'inclusionary rule,' however is subject to the balancing test of Rule 403. Thus, 'in admitting relevant evidence under 404(b), the trial court must balance the probative value of the evidence against the possibility that the jury would be prejudiced against the defendant because of his participation in other criminal conduct.' (Citation omitted.)
>
> If the trial judge concludes that the balancing weighs in favor of admitting the evidence, he should ordinarily instruct the jury carefully as to the limited purpose for which the evidence is admitted. (Citations omitted.)"

The district court gave the jury a limiting instruction with respect to the evidence of Heath's bias against the respondents. (R.T. 8-15-16.) The following is an excerpt from the Reporter's Transcript:

> "Q. Thank you.
>
> Directing your attention now to the date of February 26, 1983, on that occasion, did a Newport Beach police officer arrest you for being intoxicated in public.

A. I —

THE COURT: Just a second, counsel. Any evidence of a February 26, 1983 contact between plaintiff and officers in the Newport Beach police department is received and may be considered only for a limited purpose, to show, to the extent it does tend to show, any bias or prejudice of the plaintiff toward the Newport Beach police department.

In short, it is received only insofar as it may tend to reflect on the credibility of plaintiff's testimony and not for any other purpose.

Specifically, it may not be used to show that the plaintiff acted in any particular way on the date of the incident in question.

And, further, you should understand that any evidence is not used to show any character trait of the plaintiff or that he was or was not guilty in fact of the offense for which he was arrested, if he was arrested on another occasion.

Again, the purpose of the evidence is limited to your consideration of the question of bias, if any, of the plaintiff against the Newport Beach police department insofar as it tends to show such.

You may answer, doctor."

The Court of Appeals in *Heath v. Cast, supra* addressed the issue concerning the admissibility of evidence of plaintiff's prior arrest by Newport Beach Police Officers. The Court of Appeals noted in their opinion:

> "The jurors as the sole triers of fact and credibility were entitled to hear evidence and decide the extent of that bias."

The Court of Appeals continued:

> "We next consider whether the trial court erred in determining under Federal Rule of Evidence 403 that the probative value of the evidence of prior acts was not substantially outweighed by the danger of prejudice from the admissions of that evidence. It appears from the trial record that the probative value and prejudicial effect of the evidence was adequately weighed by the court before the evidence was admitted. The court also gave the jury a limiting instruction with respect to the evidence."

VI.

CONCLUSION

Petitioner has not demonstrated adequate grounds to disturb the opinion of the Ninth Circuit in this matter.

For the reasons set forth above, the respondents herein submit that a writ of certiorari should not be granted in this case.

Respectfully submitted,

THOMAS J. FEELEY
JACK R. LENACK
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THOMAS J. FEELEY
Attorneys for Respondents,
Officers D. Cast, R. Hardy,
P. Perrin, and J. Brown

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DR. ROBERT HEATH,
Plaintiff-Appellant,

v.

DOUGLAS CAST, ROBERT HARDY,
JOSEPH BROWN and PETER PERRIN,
Defendants-Appellees.

No. 85-6571

D.C. No.
CV 84-1397 HLH

OPINION

Argued and Submitted
October 3, 1986 — San Francisco, California

Filed March 24, 1987

Before: Arthur L. Alarcon, Stephen Reinhardt and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

SUMMARY

Courts and Procedure/Jury

Appeal from a judgment following a jury verdict in a civil rights action. Affirmed.

Appellant Robert Heath and his brother, Larry Heath, were in a bar in Newport Beach, California, when a police officer asked Larry for identification. When Larry failed

to produce any, he was taken outside of the bar by the officer. Heath protested the detention of his brother, an altercation ensued, and Heath was arrested for interfering with a police officer and for battery. In the state criminal prosecution, testimony of the police officers involved was suppressed on the ground that in arresting Heath, the police officers had acted without probable cause and had violated Heath's fourth amendment rights. The charges were thereafter dismissed, and Heath filed this civil rights action under 42 U.S.C. § 1983. Following a jury trial, judgment was entered in favor of the police officers. Heath raises a number of issues on appeal.

[1] After the regular jury had been selected, two alternate jurors, Ms. Basilio and Ms. Schmitt, were called. Basilio, who had been called first, was excused for cause. Ms. Bolles was then called, seated in the first alternate juror seat vacated by Basilio and questioned as the prospective first alternate. Only after completion of Bolles' questioning was Schmitt questioned. Following the voir dire, neither party exercised a peremptory challenge, and Bolles and Schmitt were sworn in as alternate jurors. During the trial, one of the regular jurors was excused because of illness, and the trial judge, over the objection of Heath's counsel, selected the replacement alternate (Bolles) by lot. [2] Rule 47(b) of the Federal Rules of Civil Procedure provides that alternate jurors shall replace excused jurors "in the order in which they are called." Because Schmitt was called ahead of Bolles, she should have been seated ahead of Bolles. Use of the lottery system is not permitted. [3] However, reversal is not necessary, because the error was harmless. When Basilio was excused as the first alternate and Bolles replaced her, Bolles was questioned first during voir dire and was seated in the chair designated for the first alternate. During the entire trial up to the time of the

lottery, Bolles was treated by the court and by Heath as the *de facto* first alternate and Schmitt as the *de facto* second alternate. Because Bolles ultimately replaced the excused juror, the use of the lottery did not affect Heath's earlier decision not to exercise a peremptory challenge as to either Bolles or Schmitt. Thus, seating Bolles as a regular juror did not affect the substantial rights of any party.

[4] Heath contends that he was arrested without probable cause and that the police used excessive force. Because his motion to suppress evidence in the state criminal proceeding was granted, he argues that collateral estoppel precludes litigating the issues of probable cause and excessive force in this case. [5] However, for collateral estoppel to apply, there must have been a final judgment on the merits, and [6] motions to suppress evidence are not considered final judgments under California law for the purpose of collateral estoppel.

[7] Heath also contends that evidence of his prior arrest by the Newport Beach police and of his brother's prior misdemeanor convictions resulting from arrests made by the same police agency were erroneously admitted. [8] However, that evidence was probative of Heath's bias against the Newport Beach police and of his motive in bringing this action, and [9] the trial judge adequately weighed the probative value and the prejudicial effect of the evidence before admitting it. [10] The trial judge also properly refused to admit evidence of the state's dismissal of the criminal charges against Heath. The dismissal did not establish Heath's innocence nor was it probative of whether the officers had probable cause or used excessive force.

Objections to various jury instructions and to the testimony of certain medical experts were without merit.

COUNSEL

Stephen Yagman, Los Angeles, California, for the plaintiff-appellant.

Thomas J. Feeley, Los Angeles, California, for the defendants-appellees.

OPINION

THOMPSON, Circuit Judge:

Appellant Robert Heath brought this civil rights action under 42 U.S.C. § 1983. He claimed that Newport Beach police officers arrested him without probable cause and used excessive force to effect his arrest. Following a jury trial in the district court, judgment was entered in favor of the police officers. On appeal, Heath contends the trial court erred (1) in seating an alternate juror by lot, (2) in failing to give preclusive effect to a prior state court ruling which suppressed evidence, (3) in admitting evidence of prior bad acts, (4) in refusing to admit evidence of the dismissal of state criminal charges pertaining to his arrest, (5) in failing to give requested jury instructions, (6) in giving jury instructions he contends were improper, (7) in not permitting him to recall a medical expert witness who had testified, and (8) in refusing to exclude testimony by another medical expert. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I

FACTS

Heath and his brother, Larry Heath ("Larry"), were in a bar in Newport Beach, California. A police officer asked Larry for identification. When Larry failed to produce the

identification, he was taken out of the bar by the officer. Heath protested the detention of his brother, Larry. An altercation with the police ensued and Heath was arrested. He was charged with interference with a police officer in the discharge of his duties (Cal. Penal Code § 148) and battery upon an officer (Cal. Penal Code § 243). In the subsequent criminal prosecution in state court, Heath moved to suppress any testimony by the police officers concerning the circumstances of his arrest from the time the officers first approached Larry in the bar. His motion was made under California Penal Code section 1538.5. The motion was granted on the ground that in arresting Heath the police officers had acted without probable cause and had violated Heath's fourth amendment rights. After his suppression motion was granted, Heath moved to dismiss all of the state charges. The motion was unopposed by the prosecution. The state court granted the motion and the charges were dismissed. Heath then filed this civil rights action.

II

ANALYSIS

A. Seating Alternate Juror by Lot

[1] After the regular jury was impaneled, two alternate jurors were selected. The trial transcript reflects the following with regard to this selection process:

THE COURT: Now we need to get two alternate jurors. I'm going to suggest that the first name called take the first seat in the second row nearest to this end of the jurybox, and the *second alternate* take the seat right next to the *first one*. . . .

THE CLERK: Jesusa Basilio. B-a-s-i-l-i-o. First name spelled J-e-s-u-s-a. Again the last name is spelled B-a-s-i-l-i-o.

THE COURT: Miss Basilio, if you are chosen, you will act as alternate juror. Let's get the *second alternate* first and then we will start the questioning.

THE CLERK: Sharon Schmitt. S-c-h-m-i-t-t. Sharon Schmitt. . . .
(emphasis added)

The two alternate jurors, Ms. Basilio and Ms. Schmitt, were seated, respectively, where the first and second alternate jurors would sit during trial. Basilio, who had been called first, was excused for cause. Mr. Bolles was then called, seated in the first alternate juror seat vacated by Basilio and questioned as the prospective first alternate. Only after the completion of Bolles' questioning was Schmitt questioned. Following the court's voir dire of the two alternates, the trial judge asked if either party wished to exercise a peremptory challenge. Neither party did, and Bolles and Schmitt were sworn in as the alternate jurors. Bolles remained in the first alternate seat and

Schimtt in the second; they occupied these positions throughout the trial.

During the trial one of the regular jurors was excused because of illness. The trial judge proposed selecting one of the alternates to replace the excused juror by placing the nametags of Bolles and Schmitt in a metal box and drawing one out randomly. The following colloquy then occurred:

MR. YAGMAN:	I believe the appropriate procedure is that Alternate Number One is be taken first, that there is not to be a drawing.
THE COURT:	No, there is no Number One or Two. Alternate.
MR. YAGMAN:	They were designated as One and Two, Your Honor. And the rules provide that that happens absent a stipulation. And there has been no signed stipulation.
THE COURT:	I've never worked it that way. Alternates are alternates, and we draw.
MR. YAGMAN:	I think the Federal Rules of Civil Procedure say they have to be taken in the order in which they were *chosen.*
THE COURT:	All right. We are going to do it my way. Do you have any objection?

MR. FEELEY: (defense counsel)	No, Your Honor.
THE COURT:	All right. (emphasis added).

In contending that the first alternate should be the replacement juror, Heath's counsel (Mr. Yagman) did not state whether he considered Bolles or Schmitt to be that individual. Over his objection, the court proceeded to draw by lot, and the nametag of Bolles was drawn. Bolles was then seated as a regular juror and the trial continued. Heath argues, as he did in his motion for a new trial, that the procedure followed by the district court in seating Bolles violated Federal Rule of Civil Procedure 47(b), that Schmitt should have replaced the ill juror, and that a new trial is required.

Violation of Rule 47(b)

[2] Rule 47(b) provides in relevant part: "Alternate jurors *in the order in which they are called* shall replace jurors who, prior to the time the jury retires to consider its verdict, become . . . unable . . . to perform their duties." Fed. R. Civ. P. 47(b) (emphasis added). We review the district court's interpretation of this rule de novo, *United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984). We conclude that the trial court erred in selecting the replacement juror by lot rather than by following the procedure prescribed by Rule 47(b). Schmitt was called ahead of Bolles and she should have been seated as a regular juror ahead of Bolles. The violation of the rule is clear. Use of the lottery system to select jurors is not permitted. *See* Fed. R. Civ.P.47(b). The more difficult question is whether reversal is required.

Heath argues that the violation of Rule 47(b) was prejudicial. He points out that the Rule entitles each side to only one preemptory challenge when two alternate jurors are to be impaneled. He argues, with some force, that because the first alternate is more likely than the second to end up serving as a regular juror, counsel are more concerned about the first alternate and more likely to exercise their peremptory challenge to excuse a person being considered for that position. Accordingly, Heath says, to exercise Rule 47 rights effectively, a party must know which of two alternate jurors will be the first to replace a regular juror. He says that counsel might use different standards in determining whether to challenge a prospective juror depending on whether that juror is to be the first or second alternate.

[3] In the circumstances of the case before us, the use of a lottery to select one of the two alternates as a replacement juror, while clearly erroneous, was also clearly harmless beyond a reasonable doubt. While a lottery should not have been used in the absence of a stipulation by both parties, its use here resulted in the selection of Bolles as the replacement juror. Bolles, as we have stated, was questioned first during voir dire and was seated, from the moment she stepped forward, in the chair designated for the first alternate. Moreover, in the initial process by which the alternates were selected, the court referred to Schmitt's status as that of "second alternate." And at the time of the lottery, Heath reminded the court of the earlier designation of the jurors as alternate one and alternate two. In sum, bolles was treated by the court and by Heath as the *de facto* first alternate and Schmitt was treated as the *de facto* second alternate during the entire trial up to the time of the lottery. Because it was Bolles who ultimately replaced the excused juror, the use of the lottery did not affect Heath's

earlier decision not to exercise a peremptory challenge as to either Bolles or Schmitt. It is clear to us, therefore, that the error in seating Bolles as a regular juror did not affect the substantial rights of any party. Fed. R. Civ. P. 61[1]

"While in a narrow sense Rule 61 applies only to the district courts, *see* Fed. Rule Civ. Proc. 1, it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). And as the Supreme Court stated in *McDonough Power*:

> " '[A litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." (citations omitted). Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload. . . .

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[1]Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. *The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*

Fed. R. Civ. P. 61 (emphasis added)

> We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered " 'citadels of technicality.' " (citation omitted). The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial. . . .

Id. at 533.

We conclude that in this case the district court did not commit reversible error, notwithstanding the violation of Rule 47(b). In so doing, we do not condone violations of the Rule and note that under different circumstances its violation might require a new trial.

B. Issue Preclusion

[4] The gravamen of Heath's lawsuit is his contention that he was arrested without probable cause and that the police officers used excessive force to effect his arrest. He argues the grant of his motion to suppress evidence under California Penal Code section 1538.5 in his state criminal case precludes the litigation of the issues of probable cause and excessive force in this case. He bases this argument on the doctrine of collateral estoppel.

The availability of collateral estoppel is a mixed question of law and fact in which legal issues predominate. We review these issues de novo. *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1519 (9th Cir. 1985). *See United States v. McConney,* 728 F.2d 1195, 1202-04 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984). State law governs the doctrine of issue preclusion in federal courts. *Takahashi v. Board of Trustees,* 783 F.2d 848, 850 (9th Cir.), *cert. denied,* 106 S. Ct. 2916 (1986). *See also Allen v. McCurry,*

449 U.S. 90 (1980) (doctrine of collateral estoppel applies to section 1983 cases).

[5] California courts apply a three-step analysis to determine whether collateral estoppel is applicable to a particular issue. First, there must be a final judgment on the merits. Second, the issue decided in the prior adjudication must be identical to the one presented in the action in question. Third, the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, to the prior adjudication. *Bernhard v. Bank of America,* 19 Cal. 2d 807, 813; 122 P.2d 892, 895 (1942) (citations omitted); *Miller v. Superior Court,* 168 Cal. App. 3d 376, 381, 214 Cal. Rptr. 125, 128 (1985).

[6] Motions to suppress evidence under California Penal Code section 1538.5 are not considered final judgments under California law for purposes of collateral estoppel. *People v. Gephart,* 93 Cal. App. 3d 989, 156 Cal. Rptr. 489 (1979). In *Gephart,* defendants were convicted of armed robbery in Siskiyou County, California, after the superior court in that county refused to suppress evidence which had been ordered suppressed as a result of a section 1538.5 suppression motion made in a prior prosecution of the defendants on different charges in the superior court in Stanislaus County, California. The charges in Stanislaus County were dismissed after the suppression motion was granted. The defendants argued that under principles of *res judicata* and collateral estoppel, the superior court in Siskiyou County was bound by the ruling suppressing evidence which had been made in Stanislaus County. The California Court of Appeal rejected this argument, holding that neither *res judicata* nor collateral estoppel were applicable because the prior ruling on the suppression motion in Stanislaus County made under California Penal Code section 1538.5 could not be

considered a final judgment for purposes of either *res judicata* or collateral estoppel. "The determination on a motion under Penal Code section 1538.5 is a preliminary evidentiary determination and is independent of the real question in the proceedings, that of the accused's guilt." *Gephart,* 93 Cal.App.3d at 1000, 156 Cal. Rptr. at 495 (citation omitted). *Compare Miller v. Superior Court,* 168 Cal. App. 3d 376, 214 Cal. Rptr. 125 (1985) (city collaterally estopped in civil action from relitigating issue of whether plaintiff was raped by city police officer where officer had been convicted of raping plaintiff in prior criminal case; prior conviction was a final judgment).

Because an order suppressing evidence under California Penal Code section 1538.5 is not a final judgment on the merits, Heath has failed to satisfy the first requirement for the application of the doctrine of collateral estoppel. We need not, therefore, reach the questions of issue identity or privity. The district court properly refused to apply the doctrine of collateral estoppel.

C. Prior Bad Acts

[7] Heath contends the district court erred in admitting evidence of his prior arrest by Newport Beach police officers and evidence of his brother's prior misdemeanor convictions resulting from arrests made by the same policy agency. He argues the court improperly admitted this evidence to prove his character in violation of Federal Rule of Evidence 404(b).[2] He further contends that even

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[2]Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

if the evidence was relevant to show bias against the Newport Beach police officers, the prejudicial effect of the evidence outweighed its probative value and the evidence should have been excluded under Rule 403 of the Federal Rules of Evidence.[3]

We first consider whether the trial court abused its discretion in determining that this evidence of prior bad acts was relevant to the issue of bias of Heath and his brother against the Newport Beach police, and admissibile under Rule 404(b). At tiral, Heath agreed to stipulate that he and his brother were biased against the police officers. He argues it was error for the court to admit the evidence for the purpose of showing bias when he was willing to stipulate to the very bias the evidence was offered to show.

[8] "Rule 404(b) is 'one of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove *only* criminal disposition.' " *United States v. Sangrey,* 586 F.2d 1312, 1314 (9th Cir. 1978) *quoting United States v. Rocha,* 553 F.2d 615, 616 (9th Cir. 1977)) (emphasis in original). Evidence of Heath's prior arrest, and of his brother's prior misdemeanor convictions, were probative of their bias against the Newport Beach police and of Heath's motive in bringing this action. The jurors, as sole triers of fact and credibility, were entitled to hear the evidence and decide the extent of that bias. A stipulation simply that bias

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preparation, plan, knowledge, identity, or absence of mistake or accident.

[3]Rule 403 provides in part:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .

exists precludes the jury from assessing the degree of bias. The trial court did not abuse its discretion in admitting this evidence notwithstanding Heath's proposed stipulation.

[9] We next consider whether the trial court erred in determining under Federal Rule of Evidence 403 that the probative value of the evidence of prior bad acts was not substantially outweighed by the danger of prejudice from the admission of that evidience. It appears from the trial record that the probative value and prejudicial effect of the evidence were adequately weighed by the court before the evidence was admitted. The court also gave the jury a limiting instruction with respect to this evidence.[4]

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[4]Heath was asked on cross-examination: "Directing your attention now to the date of February 16, 1983 [the prior arrest], on that occasion did a Newport Beach police officer arrest you for being intoxicated in public?" Before Heath could answer, the court interrupted the cross-examination and instructed the jury:

> Any evidence of a February 26, 1983 contact between plaintiff and officers of the Newport Beach Police Department is received and may be considered only for a limited purpose, to show, to the extent it does tend to show, any bias or prejudice of the plaintiff toward the Newport Beach Police Department.
>
> In short, it is received only insofar as it may tend to reflect on the credibility of plaintiff's testimony and not for any other purpose.
>
> Specifically, it may not be used to show that the plaintiff acted in any particular way on the date of the incident in question.
>
> And, further, you should understand that any such evidence is not used to show any character trait of the plaintiff or that he was or was not guilty in fact of the offense for which he was arrested, if he was arrested on another occasion.
>
> Again, the purposes of the evidence is limited to your consideration of the question of bias, if any, of the plaintiff against the Newport Beach Police Department insofar as it tends to show such.

Evidentiary rulings are reviewed for abuse of discretion. *Coursen v. A. H. Robins,* 764 F.2d 1329, 1333 (9th Cir. 1985). The district court did not abuse its discretion in admitting the evidence of prior bad acts.

D. Evidence of Dismissal of Criminal Charges

[10] Heath contends the district court erred in failing to admit evidence of the state court's dismissal of the criminal charges against him. He argues it was unfair and asymmetrical to admit evidence of his prior arrest, but reject evidence that the criminal charges relating to his more recent arrest which was the subject of the present lawsuit had been dismissed. The trial court considered this argument, weighed the relevant factors, and determined that evidence of dismissal of the criminal charges would be more prejudicial than probative. The criminal charges had been dismissed on Heath's motion, unopposed by the prosecution, following the state court's ruling suppressing testimony by the arresting officers. The dismissal did not establish Heath's innocence nor was it probative of whether the officers acted with probable cause or used excessive force in effecting Heath's arrest. The district court did not abuse its discretion in rejecting this evidence. Fed. R. Evid. 403.

E. Jury Instructions

Heath argues the court erred in refusing to give the following instruction to the jury:

> If you should find that a party willfully suppressed evidence in order to prevent its being presented in this trial, you may consider such suppression in

> determining what inferences to draw from the evidence or facts in the case against him.[5]

He contends the defendants intentionally suppressed initial reports of the defendants' two expert medical witnesses. Doctors Sharma and Petersons, and that the identity of two other witnesses was concealed from him.

The record reveals that Heath must have known of the existence of Dr. Sharma's initial report during pretrail discovery because it was referred to in a subsequent report by Dr. Sharma which had been provided to Heath. As to Dr. Petersons' initial report, that was furnished to Heath sufficiently in advance of Dr. Petersons' examination to permit effective cross-examination. Finally, the names of the witnesses Heath claims were concealed were disclosed during trial and the district court recessed the trial to permit Heath to depose them. He did so, and then did not call either of them as a witness. No evidence was suppressed and the court did not err in refusing to give Heath's requested willful suppression of evidence instruction. *See United States v. Wellington,* 754 F.2d 1457, 1463 (9th Cir.), *cert. denied,* 106 S.Ct. 593 (1985) (trial court has broad discretion in formulating jury instructions and will be reversed only upon a showing of abuse of discretion); *compare 999 v. CIT Corp.,* 776 F.2d 866, 871 (9th Cir. 1985) (the claim that a court failed to give the jury a proper instruction is a question of law reviewable de

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[5]This instruction is taken from California's standard BAJI Instruction 2.03. There is no comparable standard instruction for use in civil cases in federal court. *See* E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions,* § 72.19 (3d ed. 1977 & Supp. 1986). In California it is prejudicial error to give BAJI 2.03 if there is no showing that evidence has been at least willfully, and perhaps fraudulently, suppressed. *See County of Contra Costa v. Nulty,* 237 Cal.App.2d 593, 47 Cal.Rptr. 109 (1965).

novo). Under either standard, the district court did not err in refusing to give the requested instruction.

Heath also contends the district court committed error in failing to give instructions which he requested pertaining to probable cause, use of excessive force, and defining an "arrest." These claims are without merit. A court is not required to instruct the jury in words chosen by a party nor to incorporate every proposition of law a party suggests. It is sufficient if the instructions as given allow the jury to determine intelligently the issues presented. *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381, 1398 (9th Cir.), *cert. denied,* 469 U.S. 990 (1984). Considering the instructions as a whole, the jury was adequately instructed on each element of the case and the instructions given by the trial judge accurately reflect controlling law. *Id.*

Heath's contention that the district court erred in giving an instruction on the officers' good faith is also without merit. The jist of this argument is that the officers' good faith is relevant only in connection with a defense of qualified immunity and Heath contends that defense is not available in this case. He's wrong in this contention. We have recently held that "[t]he qualified immunity defense is available in cases of unlawful arrest." *Hamblen v. County of Los Angeles,* No. 85-5735, slip op. at 7 (9th Cir. 1986) (citations omitted). And in any event only one jury instruction included the words "good faith," and that instruction concerned the issue of punitive damages, not qualified immunity.[6]

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[6]The instruction reads:

> The defendants contend that on or about the date and at the time and place alleged, certain defendants did arrest the plaintiff with probable cause to do so and used reasonable force to

F. The Medical Expert Witnesses

The defense had two medical expert witnesses: Dr. Sharma, a psychiatrist, and Dr. Petersons, a neurosurgeon. Both of these doctors examined Heath on two separate occasions. Each prepared an initial report and a subsequent report. During the discovery phase of the case, the magistrate ordered all defense medical reports turned over to Heath. The defense turned over the second reports, but did not turn over the initial reports. These initial reports were furnished to Heath's counsel at the time of trial.

1. Court's Refusal to Recall Dr. Sharma

Dr. Sharma testified and was excused. Thereafter, Heath's counsel claimed he learned of the existence of Dr. Sharma's initial medical report only after Sharma had completed his testimony. He requested permission to recall Dr. Sharma so that Sharma could be cross-examined on his initial report. The district court refused to permit Heath to recall Sharma. The court found that Heath's counsel must have been aware of the existence of Sharma's initial report during the discovery phase of the

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effect his arrest. But defendants deny that any conduct or act of theirs deprived the plaintiff of any right or privilege or immunity secured to him by the Constitution or laws of the United States and further deny that plaintiff was injured as a result of any unlawful act or conduct by the defendants or that plaintiff was injured or damaged in the amount or sum claimed by him or any other sum or amount. And they also deny that any act or conduct of the defendants toward plaintiff was malicious or wanton or oppressively done. and *in this connection* defendants allege that all of their acts and conduct of which the plaintiff complains were done in good faith in the pursuance of the defendants' lawful authority and lawful duty as a police officer. (emphasis added).

litigation and rejected Heath's claim of surprise. Heath's counsel was then permitted to read into the record, before the jury, a paragraph from Dr. Sharma's report which Heath contended impeached Sharma.

The defense may have disobeyed a discovery order in failing to turn over Sharma's initial report earlier, but the district court did not abuse its discretion in refusing to permit Heath to recall Sharma. Since Heath had adequate notice of the existence of the initial Sharma report during the discovery phase of the litigation, he could have moved to compel its production and neglected to do so. *See Peraza v. Delameter,* 722 F.2d 1455 at 1456 (1984).

2. Court's Refusal to Exclude Dr. Petersons' Testimony

Heath's counsel was provided with a copy of Dr. Petersons' initial report before Petersons testified. Heath contends, however, that because the defense failed to turn over this report until the time of trial he was "deprived of an opportunity to evaluate the report and to effectively question Petersons because [he] had no opportunity to read, digest, and evaluate that report, and then to consult with appropriate experts to formulate questions for Petersons." The record reflects, however, that Dr. Petersons was present and ready to testify at the trial on Friday, November 8, 1985. When Heath's counsel became aware of the existence of Dr. Petersons' initial report, he moved to exclude Petersons' testimony based upon his claim that failure to provide the report violated the magistrate's discovery order in the case. The district court refused to exclude Dr. Petersons' testimony because to have done so would have been too severe a sanction, even if the discovery order had been violated. The district court then continued the trial to the following Tuesday, November 12th, so that Heath's counsel could review Petersons'

initial report and consult with his own expert. Heath's medical expert was scheduled to testify at 9:00 a.m. on November 12th. Dr. Petersons' testimony was rescheduled to 1:30 p.m. on November 12th. Heath's argument that he was denied the opportunity to review Dr. Petersons' initial report and consult with his own medical expert in advance of examining Petersons is without merit. That simply did not occur. The trial court did not abuse its discretion in refusing to exclude Dr. Petersons' testimony.

AFFIRMED.

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 17, 1987, I served the within Brief in Opposition to Petition for Writ of Certiorari in re: "Dr. Robert Heath vs. Douglas Cast, Robert Hardy, Dave Brown" in the United States Supreme Court, October Term 1987, No. 85-6571;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Stephen Yagman
Yagman & Yagman
10880 Wilshire Boulevard
Suite 1900
Los Angeles, California 90024

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 17, 1987, at Los Angeles, California

STEVEN H. RESNICK

Subscribed and Sworn to before me this 17th day of July, 1987.

My Commission Expires Feb 9, 1990.

Notary Public

OFFICIAL SEAL
CECILIA MEDINA
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires FEB 9, 1990